David R. Webb Co., Inc. *and* Eugene McGaha. Case 25–CA–18553

July 7, 1993

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

A controversy having arisen over the amount of backpay due the discriminatees under the terms of the Decision and Order[1] issued by the National Labor Relations Board on September 30, 1988, the Regional Director for Region 25 issued a backpay specification and notice of hearing alleging the amount of backpay due.

A hearing in the above matter was scheduled for June 28, 1993. On May 10, 1993, the Respondent filed with the Regional Director identical applications to take deposition with respect to each of the three discriminatees. In support of its applications to depose, the Respondent's counsel alleged before the Regional Director that the Respondent has no way of obtaining information with regard to matters necessary for the preparation of its case and to meet its burden of proof, that it must first obtain the information from the discriminatees by deposition, and then verify such information by reviewing employment records.

By letter dated May 20, 1993, the Regional Director denied the request to depose, contending that the employees are just as accessible to the Respondent for interviews as they are to the General Counsel and that evidence concerning the employees' search for interim employment and interim earnings had already been provided.

On May 28, 1993, the Respondent filed a request for special permission to appeal the Regional Director's denial of request to take deposition and a motion to stay hearing. In its appeal the Respondent contends that testimony is needed before the hearing so that the Respondent can verify the information given, that interviews with the employees ''are not evidence taken under oath,'' that a backpay proceeding differs from a hearing on the merits in that the Respondent has the burden of disproving the specification and that the NLRB Casehandling Manual (CHM sec. 10733) provides that a ''more liberal attitude toward depositions should be shown'' by the General Counsel, that the information supplied by the Region was ''self-serving statements of the individuals themselves,'' that the Regional Director's decision contravenes the Board's procedures in regard to permitting discovery in backpay proceedings, and that the Regional Director's denial of the requests to depose is erroneous. The Respondent moves the Board to grant the appeal, reverse the Regional Director, and order that depositions be taken, and that the hearing be stayed until the discriminatees have been deposed and the Respondent has an opportunity to review and use the depositions.[2]

The General Counsel filed an opposition to the Respondent's request, arguing that the Respondent's reasons do not reveal any extraordinary circumstances why deposing the discriminatees is necessary, and that subject matters which form the ultimate issues must be conducted in the presence of the factfinder subject to the administrative law judge's credibility findings. The General Counsel further argues that the General Counsel has already provided the Respondent with the same information which the Respondent seeks through depositions, i.e., interim earnings, search for employment, and availability for work, that the Respondent will have ample opportunity to cross-examine the discriminatees if they are called to testify or to call these individuals as their own witnesses, and absent any showing that the Respondent has been unable to contact the discriminatees, the Respondent has failed to demonstrate good cause for taking depositions.

The Respondent seeks special permission to appeal the Regional Director's denial of its request for permission to take depositions of the three discriminatees in this case and for stay of the compliance hearing pending the taking of such depositions. We grant the request for permission to appeal and affirm the Regional Director.[3]

Even in compliance proceedings, the Board does not in ordinary circumstances permit prehearing discovery such as depositions. *December 12, Inc.*, 282 NLRB 475 at fn. 1 (1986); *Flite Chief, Inc.*, 258 NLRB 1124, 1125 (1981), enfd. mem. 696 F.2d 1003 (9th Cir. 1982). As those cases suggest, the General Counsel is correct in stating that, read in context, the reference in the Casehandling Manual to ''a more liberal attitude toward depositions'' clearly concerns special circumstances in which witnesses are distant or otherwise difficult to reach.[4] The grounds for the Respondent's request here could apply to virtually any backpay proceeding. To accept them as good cause for granting an exception to our normal procedures would be to make prehearing discovery routinely available in such proceedings. Neither the constitution nor any statute re-

[1] 291 NLRB 236. The Board found that the Respondent violated Sec. 8(a)(1) and (3) of the Act by terminating the employment status and preferential recall rights of three employees.

[2] By an unpublished Board Order dated June 25, 1993, the parties were advised that the Respondent's request for special permission to appeal the Regional Director's denial of request to take depositions and motion to stay had been denied and that a published decision would follow.

[3] We therefore clarify the Order of June 25 to say that the appeal is denied on its merits.

[4] CHM (Part Three) Compliance Proceedings, sec. 10733.

quires making such discovery routinely available.[5] Even granting that some advantages may be gained from prehearing discovery, the fact remains that it can be productive of delay, offering, as it does, abundant opportunities for collateral disputes. The tradeoff reflected in the Board's long-established policies is not unreasonable, and we see no reason for abandoning those policies now. Accordingly, we find that the Regional Director did not abuse her discretion, and we affirm her denial of the Respondent's request for permission to take depositions and postpone the hearing.

MEMBER RAUDABAUGH, dissenting.

I would grant permission to appeal and I would have a full reexaminination of extant policies in this area. The Respondent asked to depose the discriminatees in this compliance proceeding. In such a proceeding, unlike the initial unfair labor practice proceeding, the Respondent bears the burden of proof. In addition, the NLRB Casehandling Manual (CHM sec. 10733), although not binding law, prudently suggests that, in compliance proceedings, ''a more liberal attitude should be displayed toward depositions [of discriminatees].''[1] Such depositions may well provide a faster and fairer means of resolving compliance issues, and indeed may obviate the necessity for a hearing. Finally, the time for dealing with the Respondent's request is now, not in the exceptions process after the hearing has been held.

The Respondent's basis for the request is to verify, prior to any hearing, information supplied by the discriminatees relevant to their claim. Such verification can serve to narrow the issues in a hearing or to eliminate entirely the necessity for a hearing. If there is a hearing, the depositions may be used for cross-examination, a proven method of arriving at truth.

Weighing against these advantages, my colleagues contend that such depositions ''can be productive of delay.'' They are careful to avoid the unsupported contention that depositions, confined to backpay hearings, will necessarily have that result. Surely, the Board could impose clear limitations, including time limitations, on such depositions. Finally, and most importantly, I am only suggesting here that the Board *consider* the matter or initiate a field experiment, rather than reject it out-of-hand.

[5] See, e.g., *Kenrich Petrochemicals v. NLRB*, 893 F.2d 1468, 1484–1485 (3d Cir. 1990).

[1] CHM sec. 10733.